

Imac Energy Inc., Rockmovers, Inc., Skilled Operator Corp., Carbon Tech Mining Corp., and Timothy McCoy and United Mine Workers of America. Cases 10-CA-24730 and 10-CA-24906

January 22, 1997

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND HIGGINS

On November 27, 1991, the National Labor Relations Board issued a Decision and Order in this proceeding,¹ in which it ordered Respondent Imac Energy, Inc. (Imac) to reinstate and make whole for any loss of earnings eight-named employees who had been laid off and discharged in violation of Section 8(a)(3) and (1) of the Act. On April 19, 1993, the United States Court of Appeals for the Eleventh Circuit entered a judgment enforcing the Board's Order. A controversy having arisen over the amount of backpay due under the Board's Order, the Regional Director for Region 10 issued a compliance specification on March 31, 1995, and an amended compliance specification on December 15, 1995. In sum, the specification alleged that Respondents Rockmovers, Inc. (Rockmovers), Skilled Operator Corp. (Skilled Operator), Carbon Tech Mining Corporation (Carbon Tech), and Timothy McCoy are and, have been at all material times, each an alter ego of each other and Imac, and a successor to Imac, and that all Respondents are jointly and severally liable to each of the discriminatees for the backpay amounts set forth in the amended specification.

On April 21, 1995, Respondents Imac, Carbon Tech, and Timothy McCoy filed a joint response dated April 19, 1995, to the compliance specification. On September 15, 1995, they also filed an amended response dated September 13, 1995, to the compliance specification. On January 8, 1996, these same Respondents filed a joint answer dated January 8, 1996, to the amended compliance specification. Respondents Rockmovers and Skilled Operator have failed to file an answer.

On August 23, 1996, the General Counsel filed a Motion to Transfer Case to and Continue Proceedings Before the Board, for Partial Summary Judgment and to Strike Affirmative Defenses, with exhibits attached. The General Counsel seeks summary judgment as to all allegations of the amended compliance specification against Respondents Rockmovers and Skilled Operator, because they failed to file an answer, and against Respondents Imac, Carbon Tech, and Timothy McCoy, because of alleged procedural defects in their joint response, amended response, and answer. In the alternative, the General Counsel seeks Partial Summary

Judgment against Imac, Carbon Tech, and Timothy McCoy as to several specific allegations of the amended specification on the grounds that the response, amended response, and answer fail to meet the substantive requirements of the Board's Rules. The General Counsel also moves to strike affirmative defenses in the answer that attempt to relitigate issues decided in the underlying unfair labor practice proceeding.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

**Ruling on Motion for Partial Summary Judgment
and to Strike Affirmative Defenses**

I. OVERVIEW

Section 102.56(a), (b), and (c) of the Board's Rules and Regulations specify, in relevant part, that:

(a) *Filing and service of answer; form.*—Each respondent alleged in the specification to have compliance obligations shall, within 21 days from the service of the specification, file an original and four copies of an answer thereto with the Regional Director issuing the specification, and shall immediately serve a copy thereof on the other parties. The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the mailing address of the respondent.

(b) *Contents of answer to specification.*—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.*—The respondent fails to file any

¹ 305 NLRB 728.

answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

II. PROCEDURAL DEFECTS

The General Counsel alleges that the response, amended response, and answer filed jointly by Respondents Imac, Carbon Tech, and Timothy McCoy were deficient under Section 102.56(a). In particular, the General Counsel contends that all three documents lacked a mailing address for the Respondents and did not include a certificate of service on the Charging Party, only the answer had a verification of service on the Regional Office, neither the response nor the amended response had a power of attorney affixed, and the answer was untimely filed. In light of these alleged procedural deficiencies, the General Counsel asserts that the Board should strike the pleadings set forth in the Respondent's documents in their entirety and should permit these Respondents to litigate only issues of interim earnings. The General Counsel further contends that summary judgment should be granted in full as to Respondents Rockmovers and Skilled Operator because they did not file any answer to the compliance specification.

We agree with the General Counsel that the response, amended response, and answer filed by Respondents Imac, Carbon Tech, and Timothy McCoy were procedurally defective in some respects.² We

² We do not agree with the General Counsel that the Respondents' failure to affix a power of attorney was improper. The documents at issue were filed by Timothy McCoy, acting pro se. We also reject the General Counsel's contention that the answer was untimely filed. Although the General Counsel alleges that the answer was untimely because it was not received until January 8, 1996, we find that it was nevertheless timely filed. The due date of the answer was January 5, 1996, 21 days after service of the amended compliance specification on December 15, 1995. However, Sec. 102.111 of the Board's Rules and Regulations states that a document is timely if it is postmarked on the day before (or earlier than) the due date. Postmarking includes depositing the document with a delivery service that will provide a record showing that the document was tendered to the delivery service in sufficient time for delivery by the due date, but in no event later than the day before the due date. The Respondents' certificate of service indicates that the answer was

note, however, the pro se basis on which these Respondents, acting through Timothy McCoy, were proceeding. Under these circumstances, we do not regard the alleged defects at issue as a substantial failure to comply with the Board's procedural rules that would warrant striking the pleadings in their entirety. See, e.g., *Carpentry Contractors*, 314 NLRB 824, 825 fn. 10 (1994).³

We shall also deny the Motion for Summary Judgment as to Respondents Rockmovers and Skilled Operator. Although these Respondents failed to file an answer as required under Section 102.56(2), the amended compliance specification alleges that these Respondents are alter egos of each other and of Respondents Imac, Carbon Tech, and Timothy McCoy. The latter Respondents have sufficiently denied the alter ego allegation in their answer to the amended compliance specification. Because the alleged liability of Respondents Rockmovers and Skilled Operator is derivative and stems from their alleged status as alter egos of Respondent Imac, the original wrongdoer, we find that the answer filed jointly by Imac, Carbon Tech, and Timothy McCoy suffices to preclude entry of summary judgment on procedural grounds against nonanswering Rockmovers and Skilled Operator. *Media One Inc.*, 313 NLRB 876 (1994).

III. SUBSTANTIVE DEFECTS

Paragraphs 14, 15, and 17 through 31 of the amended compliance specification contain specific allegations concerning the backpay period, gross backpay formula, and amounts due to each of the discriminatees. The Respondents' answer to the amended compliance specification denies the allegations in each of these paragraphs and refers to an attached schedule that sets forth, in figures rounded to five hundreds or thousands, alternative gross and net backpay amounts allegedly owed to the discriminatees. As affirmative defenses, the Respondents also seek, by attaching to their answer documents that Imac has filed, or attempted to file, in prior stages of this litigation, to relitigate matters decided in the underlying unfair labor practice proceeding.

The General Counsel moves for Partial Summary Judgment on the allegations in paragraphs 14, 15, and

served on the Regional Director by United States Express Mail on January 4, 1996, the day before the due date. We find under these circumstances the document was timely filed, even if the document was not received by the Regional Director until January 8, 1996, as alleged by the General Counsel. Moreover, the Board has freely permitted respondents to amend the answer to a compliance specification prior to a hearing, even in the absence of an amendment to the specification. E.g., *Vibra-Screw, Inc.*, 308 NLRB 151 (1992).

³ Contrast *Contractors Excavating, Inc.*, 270 NLRB 1189 (1984) (where the Board struck an unsigned answer that the respondent untimely filed over 3 months after expiration of a fifth filing extension requested by the respondent). Accordingly, we deny the General Counsel's motion to strike on this basis.

17 through 31 of the amended compliance specification because the Respondents' answer fails to meet the specificity requirement of Section 102.56(b) of the Board's Rules. We agree. The Respondents' answer fails to state specifically the basis for disagreement with the amended specification on gross backpay issues and does not provide the applicable premises or supporting figures for the alternative backpay calculations set forth in the attached schedule. We shall therefore grant Partial Summary Judgment as to all Respondents on the allegations in paragraphs 14, 15, and 17 through 31 of the amended compliance specification.

The General Counsel also moves to strike from the Respondents' answer the affirmative defense allegations and supporting documents that seek to relitigate issues decided in the unfair labor practice proceeding. We shall grant the motion to strike. It is well settled that "[i]ssues litigated and decided in an unfair labor practice proceeding may not be relitigated in the ensuing backpay proceeding." *Transport Service Co.*, 314 NLRB 458, 459 (1994).

ORDER

It is ordered that the General Counsel's Motion for Partial Summary Judgment is granted with respect to gross backpay allegations in paragraphs 14, 15, and 17 through 31 of the amended compliance specification.

IT IS FURTHER ORDERED that the General Counsel's motion to strike those portions of the Respondents' answer that constitute attempts to relitigate matters decided in the underlying unfair labor practice proceeding is granted.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 10 for the purposes of issuing a notice of hearing and scheduling the hearing before an administrative law judge, for the taking of evidence concerning factual issues properly raised by the Respondents' answer to the amended compliance specification.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a second supplemental decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules shall be applicable.